Although consideration of material in the shape of the notes of evidence which was not before the Committee, enables us to form a somewhat less serious view of the matter than the Committee in their finding of fact No. 4, we have no hesitation in accepting their view that the respondent was guilty of grossly improper conduct. We agree that probably the respondent did not realise at the time the gravity of his misconduct. We consider that his conduct was entirely unworthy of a member of the Bar and that it was irresponsible to a degree that cannot be passed over. Our order is

That John Lawrence Pool Harris be suspended from practice for three months and pay the costs of these proceedings.

We would add that the period of suspension would have been longer but for the delays that have occurred in the determination of this matter.

Respondent suspended.

PUBLIC PROSECUTOR v. H. PARNABY.

[A. Cr. J. (Bellamy, J.) July 22, 1953]

[Seremban — Criminal Appeal No. 5 of 1953]

Criminal Procedure Code (Cap. 6), ss. 173(h) and 174 — Amendment of charge — Duty of Magistrate.

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge under the Customs Enactment, 1936. It was argued on appeal inter alia: (1) at the close of the case for the prosecution the learned Magistrate should have acted under section 173(h) of the Criminal Procedure Code and should have amended the charge; (2) the learned Magistrate should have permitted the prosecution to reply to the point of law made by the Defence Counsel at the close of the case for the prosecution.

Held: (1) it would be imposing an intolerable burden on a Magistrate to ask him where the prosecution has after consideration amended a charge and elected to proceed to trial on it, to search the law for offences which the accused may have committed and that in this case the learned Magistrate had not failed in his duty under section 173 of the Criminal Procedure Code; (2) although in practice a Magistrate generally hears both sides on a submission of no case to meet at the close of the case for the prosecution he is not bound to do so.

Cases referred to:—

(1) *Kee Kim Chooi & Ors. v. Public Prosecutor* (1952) M.L.J. 180.

(2) *Public Prosecutor v. Ishak & Ors.* (1952) M.L.J. 151.

(3) *Public Prosecutor v. Beh Yew Suan* (1952) M.L.J. 225.

(4) *Public Prosecutor v. Heng You Nang* (1948) M.L.J 285.

(5) *Chow Kwan v. Public Prosecutor* (1934) M.L.J. 164; (1933 — 1934) F.M.S.L.R. 168.

CRIMINAL APPEAL.

L. A. Massie (Federal Counsel) for the appellant.

R. H. V. Rintoul for the respondent.

Bellamy, J. : — This appeal by the Public Prosecutor against the acquittal of the respondent comes before me in the following circumstances.

Upon a complaint sworn on 5th May, 1953 by Che Onn bin Abdullah, a Junior Customs Officer, Seremban, before the Magistrate at Seremban, the Magistrate issued a summons under section 114(i)(e) of the Customs Enactment, 1936 against one Ng Kim Lek, the manager of Messrs. Lee Kee & Co., wholesale and retail liquor dealers of 102 — 103, Birch Road, Seremban, to answer the following charge :—

"That you Ng Kim Lek on or about 3rd April, 1953 at about 3.15 p.m. in premises No. 102–103 Birch Road, Seremban, did knowingly have in your possession 84½ gallons of Carlsberg (NAAFI) Beer valued at $426.72 on which the Customs Duty leviable by law amounting to $439.40 has not been proved to have been paid and thereby committed an offence under section 114(i)(e) and punishable under section 114(i) of the Customs Enactment 5/36."

The Magistrate, upon the same sworn complaint and at the same time, issued a summons under section 119 and section 114(i)(e) of the Customs Enactment, 1936 against the respondent, a Regimental Sergeant-Major serving with the 13/18th Hussars in Seremban and the Warrant Officer in charge of the Sergeants' Mess at Paroi Camp, Seremban, to answer the following charge :—

"That you, Herbert Parnaby, of Paroi Camp, Seremban, at various unknown dates between the 1st day of December, 1952 and the 3rd day of April, 1953 did abet one Ng Kim Lek, the Licensee of Lee Kee & Co. of No. 102–103 Birch Road, Seremban, in the offence of being in possession of 84½ gallons of Carlsberg (NAAFI) Beer valued at $426.72 on which the Customs Import Duty leviable by Law amounting to $439.40 has not been proved to have been paid, whereby you have committed an offence under section 119 and section 114(i)(e) and punishable under section 114(i) of Customs Enactment No. 5/36."

On the return date of the summonses, 22nd May 1953, the said Ng Kim Lek and the respondent appeared before the Magistrate's Court at Seremban where the charges were read and explained to them. Both accused claimed to be tried. Upon the application of the prosecuting officer for an adjournment for six weeks on the ground of enabling the Government Chemist at Kuala Lumpur to complete his analysis of samples of the beer which had been sent to him for that purpose, the Magistrate postponed the cases for trial to 29th June, 1953. On 29th June, 1953 a new charge contrary to the sub-section already mentioned was substituted for the former charge against each of the accused. The amended charge against the said Ng Kim Lek was as follows :—

"That you, Ng Kim Lek, on 3rd April, 1953 at about 3.15 p.m. in premises No. 102–103, Birch Road, Seremban, did knowingly have in your possession uncustomed goods to wit 84½ gallons of Carlsberg (NAAFI) beer and thereby committed an offence under section 114(i)(e) of Enactment 5/36 and punishable under section 114(i) of the same Enactment."

And the amended charge against the respondent was as follows :—

"That you, Herbert Parnaby of Rasah Camp, Seremban, at various unknown dates between the 1st day of December, 1952 and 3rd day of April, 1953, did abet one Ng Kim Lek in the offence of knowingly being in possession of uncustomed goods to wit 84½ gallons of Carlsberg (NAAFI) beer at 102–103, Birch Road, Seremban, and you have thereby committed an offence under section 119 and section 114(i)(e) of Enactment 5/36 and punishable under section 114(i) of the same Enactment."

On this amended charge each of the accused claimed to be tried and, at the request of the prosecution, the accused were tried jointly, both charges being tried together. The trial commenced on the same day. I pause here to observe that the record of the proceedings shows that before any evidence was recorded Counsel for each of the accused, to each of whom it would seem that a copy of the proposed amended charge against his client had been supplied beforehand, drew the attention of the Magistrate to the form of the amended charge, and one of them criticised it. The prosecution, however, elected to proceed with the trial on the amended charges as they then stood. After a prolonged hearing on 29th June, 1953, 1st July, 1953 and 8th July, 1953 the prosecution closed its case. Counsel for the respondent thereupon submitted that there was no case for the respondent to answer on the charge. Without calling upon the prosecuting officer to reply to this submission, the Magistrate ruled that it was well-founded, and without calling upon the respondent in his defence he acquitted him. Meanwhile, the case against the said Ng Kim Lek is still proceeding. It is because the Public Prosecutor is dissatisfied with the determination of the Magistrate in acquitting the respondent in the circumstances I have described that this appeal is brought.

In his grounds of decision, the Magistrate made up his mind, as indeed he was bound to, with regard to certain findings of fact. He found that the respondent was the Regimental Sergeant-Major of the 13/18th Hussars and was at the material time in charge of the Sergeants' Mess in Paroi Camp. He also found that sometime in December 1952 the respondent, who required beer for the Christmas celebrations, took on loan from Messrs. Lee Kee & Co. twenty cartons of "Carlsberg" beer. He also found that it was a term of the "loan" that the respondent should repay the "loan" by returning to the firm the same quantity of beer and beer of the same brand. The next finding was that four or five days later the respondent returned the same quantity of beer which he had borrowed, and this beer was of the same brand, namely, "Carlsberg" beer, but it was, to adopt a convenient term used in this case, NAAFI beer. He also found that sometime in February 1953 the respondent took another "loan" of "Carlsberg" beer from the firm, again for another function, but on this occasion it was thirty cartons; that the loan was on the same terms as previously; and that it was again repaid in the course of four or five days and of NAAFI beer from the Sergeants' Mess. Finally, he found that on 3rd April, 1953, a quantity of "Carlsberg" beer, bearing the NAAFI mark, totalling 84½ gallons was found by the Customs authorities in the possession of Messrs. Lee Kee & Co. To pause there for a moment, it seems to me to be quite clear that there was ample material before the Magistrate to support these findings of fact; indeed, so far as the prosecution was concerned, he had found all the facts which they had set out to prove to establish the truth of the charge preferred against the respondent.

Now the Magistrate, upon these findings of fact, came to the following conclusions, which I quote from his grounds of decision :—

"(i) No prima facie case has been made out. The presumption under section 114(ii) of Customs Enactment 5/36 does not apply to this case — Kee Kim Chooi & Ors. v. Public Prosecutor[1].

I refrained from exercising my power under section 158 C.P.C. because of the ruling that 'Alteration of Charge should only be necessary if something arises ex improviso which no normal ingenuity could foresee' — monthly Bulletin 133/49.

In this case not only did anything did not 'arise ex improviso which no normal ingenuity' — could not have foreseen, the prosecution had been given sufficient opportunity to amend the Charge, before the commencement of the trial, but they had chosen not to avail themselves of the opportunity.

(ii) The charge is groundless. NAAFI imported beer does not come under the category of 'uncustomed goods'. 'Uncustomed Goods' as defined in the Customs Enactment 5/36 means goods in respect of which a breach of the Customs laws, rules or regulation has during IMPORT and EXPORT of the same been committed. Since NAAFI imported beer is lawfully imported, possession of it, as far as Customs Enactment 5/36 is concerned does not mean the commission of this offence. The correctness of this interpretation to me is made clearer by the omission of the words 'IMPORT and EXPORT by the legislature in the present Customs Ordinance — 42/52.' "

The Public Prosecutor attacks the decision of the Magistrate on the following grounds, which I set out in full :—

"(1) At the close of the case for the prosecution the learned Magistrate should have acted under section 173 (h) of the Criminal Procedure Code (F.M.S. Cap. 6) and should have amended the charge against the Accused/Respondent to one of knowingly causing the first Accused Ng Kim Lek to be in possession of uncustomed goods.

(2) The learned Magistrate misdirected himself in not so amending the charge.

(3) The NAAFI beer in question was subject to an exemption from customs duty and customs duty was

not subsequently paid on it when it was found in the possession of Ng Kim Lek the first accused, accordingly the learned Magistrate should have held that the beer was uncustomed within the meaning of the definition of 'uncustomed goods' in section 2 of the Customs Enactment F.M.S. No. 5 of 1936.

(4) In not so holding the learned Magistrate misdirected himself.

(5) The learned Magistrate should have permitted the prosecution to reply to the point of law made by the Defence Counsel at the close of the case for the prosecution, no evidence for the defence having been given."

It will be readily seen that grounds (1) and (2) are complementary, as also are grounds (3) and (4). I propose to deal with them seriatim.

Upon the first and second grounds of appeal, a good deal of the controversy before me has turned, and very naturally so, upon the true construction of section 173(h) of the Criminal Procedure Code. That paragraph provides as follows :—

"(h) If, when such evidence has been taken, the Court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such Court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same."

This paragraph of section 173 of the Criminal Procedure Code has been the subject of many decisions in these Courts, and my attention has been directed to two very recent cases, namely *Public Prosecutor v. Ishak & Ors.*[2] and *Public Prosecutor v. Beh Yew Suan*[3], upon which I need not linger. A useful case on the the topic is *Public Prosecutor v. Heng You Nang*[4]. In that case, the President of the Sessions Court, having held at the close of the case for the prosecution that there was no evidence sufficient to warrant a conviction, acquitted the accused, and the Public Prosecutor appealed against the order of acquittal on the ground *inter alia* that the learned President was wrong in not exercising his discretion under section 158 of the Criminal Procedure Code by altering the charge as to the date and time of the commission of the offence, and that by omitting to do so he caused a miscarriage of justice. It was held that this ground of appeal failed. There, Spenser Wilkinson, J. said, at page 287 :—

"The third ground of appeal also failed. In the first place, as I have already pointed out, no alteration either as to date or time could have cured the defect in the charge; and secondly it is to be observed that the President invited the prosecution to frame a fresh charge under Part V of the Customs Enactment but the prosecuting officer did not elect to do so. I doubt whether section 158 imposes any duty upon a Court to alter or amend the charge. I think, rather, that it is for the prosecution to apply to the Court to exercise its power under that section. Under section 173(h), Subordinate Courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the Court to search the law for offences which an accused person may have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt, in a clear case, a President or a Magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view quite improper to criticise the President for failing to carry out the functions of the prosecuting officer."

This case was not brought to the attention of the learned Judges in *Public Prosecutor v Ishak & Ors.*[2] and *Public Prosecutor v. Beh Yew Suan*[3], but in my view their decisions are not in conflict with it. I echo and share, with respect, the opinion expressed by Spenser Wilkinson, J. in *Public Prosecutor v. Heng You Nang*[4]. Each case must necessarily be judged on its own particular facts. In the case before me, it is urged that the Magistrate erred in not amending the charge at the conclusion of the case for the prosecution to one of "knowingly causing the first accused Ng Kim Lek to be in possession of uncustomed goods", and it was suggested that had the Magistrate read the case of *Kee Kim Chooi & Ors. v. Public Prosecutor*[1], to which his attention was directed by Counsel for the defence in his submission that there was no case to answer, he could not have failed to have seen that the amended charge was defective. To that argument I must confess that I find it difficult to restrain myself from retorting that what is sauce for the goose is sauce for the gander. If the Magistrate could have seen that the amended charge was defective, how much better the prosecuting officer who framed the amended charge on the evidence which he had available and who, despite criticism of it before the trial commenced, resolutely elected to proceed with it. In those circumstances I find it difficult to see how it can be said that the Magistrate has erred in not amending further the amended charge which the prosecution, presumably after consultation with the Deputy Public Prosecutor, has elected to proceed on. In my opinion, it would be imposing an intolerable burden on a Magistrate — and a burden which I am of opinion the legislature never intended to impose — to ask him, when the prosecution has, after consideration, amended a charge and elected to proceed to trial on it, adopting the language of Spenser Wilkinson, J., to search the law for offences which the accused may have committed. I am satisfied that the Magistrate did not fail in his duty under section 173 of the Criminal Procedure Code, and the first two grounds of appeal fail. It is unnecessary for me to consider the very interesting point raised by Mr. Rintoul that the amendment which it is urged that the Magistrate should have made discloses no offence known to the law.

It is conceded that, if the respondent is guilty of an offence, it is not that of which he was charged before the Magistrate. It is therefore unnecessary for me to consider whether the subject matter of the amended

charge was "uncustomed goods" within the meaning of the Customs Enactment, 1936. I deliberately refrain from doing so in order not to prejudice the proceedings which are still pending against the said Ng Kim Lek.

As to the fifth ground of appeal, it is conceded by the respondent that the prosecuting officer did not reply to the submission made by defence Counsel at the close of the case for the prosecution that there was no case for the respondent to answer. It is submitted that the Magistrate erred in that he should have permitted the prosecution to reply to the point of law so made by defence Counsel, and that by omitting to do so he caused a failure of justice.

It is to be noted that the record does not show that any application was made by the prosecuting officer to reply to defence Counsel's address. Now, section 173 of the Criminal Procedure Code prescribes the procedure at summary trials. It is to be noted that this section is silent on the subject of addressing the Court. But section 174, the marginal note to which reads "Addresses", provides, omitting sub-section (ii) which does not apply here :—

"(i) The officer conducting the prosecution need not open the case but may forthwith produce his evidence.

(iii) The officer conducting the prosecution shall have the right of reply on the whole case when the accused has adduced evidence."

From these sub-sections, therefore, it would seem that the prosecuting officer could not as of right claim to address the Court in reply to a submission made at the close of the case for the prosecution that there is no case to answer. Although in practice a Magistrate generally hears both sides on a submission of no case to meet at the close of the case for the prosecution, he is, in my view, not bound to do so. It is, I think, clearly a matter in his discretion. This view is supported by the case of *Chow Kwan v. Public Prosecutor*[5] wherein Mudie, J. observed :—

"If a point of law is taken by the defence, in my opinion, it is open to the Magistrate to ask the prosecuting officer to argue the point....."

That being my view, it cannot be argued that the Magistrate erred in omitting to do what is a purely discretionary act, and this ground of appeal must also fail.

The result is that this appeal is dismissed.

Appeal dismissed.

LIM ENG SOON v. PUBLIC PROSECUTOR.

[A. Cr. J. (Storr, J.) May 14, 1953]

[Johore Bahru — Criminal Appeal No. 13 of 1953]

Dangerous Drugs Ordinance, s. 4(1) — Importation of raw opium — Absolute Prohibition — Mens rea.

This was an appeal against the conviction of the appellant on a charge under section 4(1) of the Dangerous Drugs Ordinance, 1952. On appeal the question was raised whether the wording of the section indicated an absolute prohibition or whether it was necessary for the prosecution to prove mens rea in order to secure a conviction.

Held: (1) the provisions of section 4(1) of the Dangerous Drugs Ordinance amount to an absolute prohibition of the import of raw opium and therefore it is unnecessary for the prosecution to prove mens rea or knowledge; (2) the lack of knowledge of the accused is a matter for mitigation of sentence.

Cases referred to :—

(1) *Ong Aik Phow v. Rex* (1937) M.L.J. 73.

(2) *Reynolds v. G. H. Austin & Sons Ltd.* (1951) 1 All E.R. 606.

(3) *Cundy v. Le Cocq* (1883-4) 13 Q.B.D. 207 at p. 209.

CRIMINAL APPEAL.

Sardon Jubir for the appellant.

M. Suffian (Federal Counsel) for the respondent.

Storr, J. : — This was an appeal from the decision of the learned President of the Sessions Court, Johore Bahru, who convicted the appellant for an offence under section 4(1) of the Dangerous Drugs Ordinance No. 30 of 1952. That section reads :—

"4(1). No person shall import into the Federation any raw opium, coca leaves or Indian hemp except under and in accordance with the authorisation of the High Commissioner and into such ports or places as may be prescribed by such authorisation."

The only point raised on appeal by Inche Sardon was whether the wording of that section indicated an absolute prohibition or whether it was necessary for the prosecution to prove *mens rea* in order to secure a conviction.

The learned President in his very careful judgment stated :—

"In my opinion for the purpose of proving the charge under section 4 it is not necessary for the prosecution to invoke any of the presumptions referred to. As a driver of the lorry he was responsible for bringing the lorry as well as its load into the Federation. Although it is not submitted by Counsel, I formed the impression that the defence would want me to hold that mens rea is an essential element in the charge. If that is the correct view of the law then the 2nd accused (i.e. appellant) must be acquitted as I am satisfied that there is no evidence to show that he had any knowledge that the parcel was in the lorry. It is the cardinal rule of the interpretation that words in the statute must be given its plain and natural meaning. If this is a charge under section 6 for possession of raw opium, then on the authorities I am bound to ascertain that there must be conscious possession. But this is a charge under section 4 and in my view this section provides for a complete prohibition against the importation of raw opium, coca leaves or Indian hemp except under or in accordance with the authorisation of the High Commissioner."

From the above it is quite clear that he came to the conclusion that on the evidence the prosecution had not proved *mens rea* or knowledge against the appellant